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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,

Petitioner.

vs.

CHRYSLER CORPORATION,

Respondent.

BRIEF OF 20 STATES AS AMICI CURIAE ON BEHALF OF PETITIONERS FOR A WRIT OF CERTIORARI

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INTERESTS OF THE AMICI STATES

The Attorneys General of the Amici States[1] are the primary or exclusive public enforcers of their states' antitrust laws and represent their states and natural person citizens in federal antitrust litigation. *See* 15 U.S.C. § 15c (Attorneys General may bring *parens patriae* actions for damages under federal antitrust laws); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439

[1] The Amici States are the States of Arkansas, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, New York, North Carolina, Oklahoma, Tennessee, Texas, Utah and Vermont.

(1945)(Attorneys General may bring *parens patriae* suits for injunctive relief under federal antitrust laws). The holdings of the Court of Appeals for the Sixth Circuit that all restraints imposed by a dual distributor are vertical as a matter of law, and that vertical restraints, price and nonprice, are legal *per se* if they could be accomplished unilaterally, will substantially and adversely affect the performance of the Attorneys General's duties. In addition, the Amici States and their local governments, agencies, authorities, and other subdivisions all make substantial use of competitive bidding in purchasing goods and services. Indeed, they are commonly required by statute to do so. *See, e.g.*, Cal. Pub. Cont. Code § 10122; Conn. Gen. Stat. § 4b-91; Haw. Rev. Stat. § 103-22; Idaho Code § 67-5711; Ind. Code § 5-16-1-1.2; Iowa Code § 18.6; Md. State Fin. & Proc. Code Ann. § 13-102; Minn. Stat. § 471.345; Miss. Code Ann. § 31-7-13; N.Y. Gen. Mun. Law § 103; N.C. Gen. Stat. § 143-52; Okla Stat. tit. 61, § 103; Tenn. Code Ann. § 12-3-202; Vt. Stat. Ann. tit. 29, § 161. The decision below, which insulates bid allocations between manufacturers who also distribute their goods ("dual distribution") and their distributors from coverage of the Sherman Act, is therefore of major concern to the Amici States.[2]

ARGUMENT

Because this jury case was decided on a motion for directed verdict, Fed. R. Civ. P. 50, the facts are to be interpreted with credibility decisions and reasonable inferences drawn in favor of the non-moving party. *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988).

Petitioner International Logistics Group, Ltd. ("ILG") purchased parts manufactured by respondent Chrysler Corporation ("Chrysler") for resale. 884 F.2d at 905.[3] Chrysler also sold

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[2] This amicus brief is submitted pursuant to Rules 37.2 and 37.5 of this Court.

[3] References to the opinions below are to the official report of the court of appeals' decision at 884 F.2d 904, and the unofficial report of the district court's opinion at 1988-2 Trade Cases (CCH) ¶ 68,127.

its parts directly to some purchasers, making it a "dual distributor." *Id.* at 906. Among the customers to whom it sold directly were its own dealers and the United States government. *Id.* at 908. According to the court below Chrysler had a special program with lower prices on parts intended to be sold for export. *Id.* at 906. ILG bought both through this program and through domestic programs. 1988-2 Trade Cases (CCH) ¶ 68,127 at 58,870.[4]

Chrysler placed several restrictions on its distributors. It prohibited customers who purchased Power Master engines from Chrysler at export prices from selling these engines within the United States. *Id.* at 906. It prohibited its distributors from selling any parts to Chrysler franchised dealers. *Id.* at 908. Finally, Chrysler prohibited its distributors, including ILG, from competing with Chrysler for certain government contracts. *Id.* at 908. Chrysler itself refrained from bidding on certain government contracts on which it did permit its distributors to bid. Tr. 398. While ILG challenged all three of these restrictions in the courts below, the Petition for Certiorari is limited to the restraint on government sales. Petition at 2 n.1.

Chrysler did not limit itself to merely announcing a general policy respecting government sales and terminating any distributor that refused to follow it. ILG testified that Chrysler officials specifically told it not to submit bids to the government on a contract for parts to be sent to Saudi Arabia, and on another contract for transmissions. Tr. 561-63; 587-89. ILG in fact submitted bids anyway. Tr. 694. Chrysler pressured ILG to conform to its policies by, *inter alia*, slowing its deliveries to ILG and subjecting it to an audit. Tr. 515-16; 584-85. Finally, after years of unsuccessful efforts to curb ILG, Chrysler terminated it. Tr. 697.

Chrysler was more successful with other distributors. For instance, another distributor, UWD, was warned by Chrysler to withdraw a bid it had submitted on a government contract in

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[4] These distinctions were not rigid. For a time ILG was permitted to buy parts from an export program for sales domestically. Tr. 90-93. Government sales could be either domestic or international. Tr. 910.

early 1983. UWD agreed, and Chrysler itself was awarded the contract. 1988-2 Trade Cases (CCH) ¶ 68,127 at 58,872; Tr. 300-01; 480-85; 498-99. With another distributor, JAMCO, Chrysler inserted a provision in the written distribution agreement that JAMCO could not quote bids to the government for over $10,000.00 without Chrysler's prior written approval. Tr. 926-27; 1187; 1193-94. Indeed, Chrysler had a general practice of "counseling" with "disruptive" customers, i.e., those who violated Chrysler policies. Tr. 1129-30. Chrysler's prices to the government were higher than its prices to its distributors. Tr. 384.

Under standard antitrust law, an agreement between two competitors that one and not the other would submit a bid on a government contract constitutes collusive bid-rigging, a *per se* unreasonable restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. § 1. The district court nevertheless directed a verdict for Chrysler on the claim. The Court of Appeals for the Sixth Circuit affirmed, finding no possible violation of the antitrust laws on these facts. The Court of Appeals reached its results in three steps[5]:

First, it held that, because the manufacturer was also a dual distributor, the restraint on trade was by law vertical and not horizontal. "Although some minimal (sic) horizontal competitive effects may have resulted, the marketing policies . . . were not directed toward or designed to impose restraints upon parties at the same competitive level even though Chrysler, the manufacturer, was also a distributor." 884 F.2d at 906. Because the

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[5] The court devoted most of its attention to claims respecting sales in the United States of Power Master engines, but applied the identical analysis to the restraint against sales to the government. "For the reasons hereinbefore discussed and those articulated by the trial court, [ILG]'s antitrust charges anchored in Chrysler's edict to dealers and distributors that it would terminate all sales of Power Master engines and Chrysler manufactured parts to its dealers and/or distributors who entered competitive bids with it for the sale of Chrysler manufactured parts to the government do not rise to the level of cognizable § 1 and § 2 Sherman antitrust action." 884 F.2d at 908. As already noted, this is the only claim raised in the Petition for Certiorari. It is also the claim of greatest interest to the Amici States.

agreement among the parties involved allocation of bids and not price-fixing, the Court of Appeals concluded that the "vertical restraints imposed by Chrysler's marketing policies must be judged by the criteria of a 'rule of reason' analysis rather than the rubric of 'per se' analysis." *Id.*

Second, the court held that there was no "contract, combination, or conspiracy" under the Sherman Act. It presented two alternative grounds for this ruling. First, it held that compliance by the distributors with Chrysler's restrictions was not a section one agreement because it was coerced. "Current legal precedent supports the conclusion that a conspiracy may not evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source." 884 F.2d at 907. Alternatively, it held that because Chrysler could in theory have achieved its goal without seeking the agreement of its distributors, the restraint was therefore unilateral as a matter of law. "Moreover, under the scenario of this case, there were no legal restraints against Chrysler's unilateral acts because Chrysler needed no acquiescence from its dealers or distributors in formulating marketing conditions for its [equipment]. . . ." *Id.*

Third, even if an agreement were proven, ILG's claim would still fail because ILG was required to prove a market, and government purchases subject to the competitive bidding process do not constitute a market. "[A]lbeit the government represent a purchaser of magnitude, it is without unique characteristics that would support its consideration as a separate geographic market." 884 F.2d at 909. Hence bid allocation involving the government alone, which the court characterized as "but a single purchaser within the overall market," does not constitute antitrust injury. *Id.*

The cumulative effect of these propositions is to make bid-allocation between a dual distributor manufacturer and its distributors *per se* legal. Because the manufacturer is a dual distributor, the agreement is automatically judged as a vertical restraint. Because all vertical restraints, up to and including

resale price maintenance, can also be achieved by "unilateral" action by the manufacturer, *see United States v. Colgate & Co.*, 250 U.S. 300 (1919), in the Sixth Circuit all vertical restraints are *per se* legal. Finally, even if the collusion were subject to review under the Sherman Act, it would always pass muster because collusion in sales to the government does not injure the market.

Each of these propositions flies in the face of precedent from this Court and from other circuits. Their combined effect is to revolutionize antitrust law in a direction which has no support in either law or economics. Grant of the petition for certiorari is therefore appropriate under Rules 10.1(a) and 10.1(c) of this Court.

Agreements Between A Dual Distributor And Its Distributors Are Not Always Vertical

The holding of the court below that restraints imposed by a dual distributor manufacturer are always to be treated as vertical, regardless of the market circumstances of the agreement or the role the manufacturer is actually playing in the market, is directly contrary to the directive of this Court to analyze restraints in terms of economic realities and not verbal abstractions. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 728 (1988). In particular, this Court stressed that the proper determination of whether an agreement is horizontal depends, not on its effects, but on whether it is "imposed by agreement between competitors. . . ." *Id.* at 730. The agreement here between Chrysler and UWD, JAMCO, and other distributors, that Chrysler would bid on some government contracts, and distributors on others, is manifestly an agreement between competitors. While it is true that Chrysler was also a supplier of its distributors, and in other contexts their agreements might well be vertical, it is superficial formalism to characterize *all* agreements between distributors and Chrysler as vertical. Other circuits and this Court look to the nature of the restraint in the market, not to a contractual formula, in determining whether it is horizontal or vertical. *See, e.g., Hobart Bros. Corp. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899 (5th Cir.), *cert.*

denied, 412 U.S. 923 (1973); *Marietta Packaging Co. v. Guest Supply, Inc.*, 1982-83 Trade Cases (CCH) ¶ 65,184 (N.D.N.Y. 1982); *see also United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 312-13 (1956)(dual distributor supplier is horizontal competitor of distributor under Fair Trade Laws); National Association of Attorneys General, *Vertical Restraint Guidelines* § 2.3 (1985), *reprinted in* 49 Antitrust & Trade Reg. Rep. (BNA) No. 1243 at 996, 999 (Dec. 5, 1985).[6]

The Amici States endorse the view of petitioners that the "bid allocation scheme . . . should have been viewed as illegal *per se*." Petition at 20.

An Agreement Between A Supplier And A Distributor Is Not "Unilateral" Whenever The Supplier Could Achieve The Same Result Without The Agreement

Having concluded that the restraints were vertical, the court below proceeded to apply the standards for agreements developed for vertical restraints. It concluded that section one of the Sherman Act did not apply to the agreements between Chrysler and its distributors to allocate government bids for two reasons. First, it asserted that the agreements were not covered by the Sherman Act because the distributors agreed under coercion. "Current legal precedent supports the conclusion that a conspiracy may not evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source." 884 F.2d at 907. The court of appeals did not identify the legal precedents on which it relied, but the precedents of this Court are very much to the contrary. *See*

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[6] The Vertical Restraints Guidelines of the National Association of Attorneys General ("NAAG") were adopted without dissent as the enforcement of policy of the Attorneys General at a plenary session of NAAG. NAAG is comprised of the Attorneys General of the fifty states, and American Samoa, Guam, Commonwealth of Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands. The Corporation Counsel of the District of Columbia, which at that time was not yet a member of NAAG, also adopted the Guidelines.

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968) ("each petitioner can clearly charge a combination between . . . [the supplier] and other franchise dealers, whose acquiescence in [the supplier's] firmly enforced restraint was induced by 'the communicated danger of termination' "); *accord*, *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964).

The alternate holding of the court below was more far-reaching. It held that, because Chrysler did not need the acquiescence of its distributors to achieve its goal of preventing them from bidding on certain government contracts, therefore the actual agreements reached between them were "unilateral." "Moreover, under the scenario of this case, there were no legal restraints against Chrysler's unilateral acts because Chrysler needed no acquiescence from its dealers or distributors in formulating marketing conditions for its [equipment]. . . ." 884 F.2d at 907. The breadth of this holding is astonishing. All vertical restraints, including resale price maintenance, can also be achieved in some form unilaterally by the manufacturer. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), this Court held that a unilateral policy by a supplier not to sell goods to distributors that sold at prices below that set by it did not violate section one of the Sherman Act. Any type of vertical restraint could be achieved in the same way. To deduce, as the Court of Appeals did, that all such vertical restraints are therefore immune from the Sherman Act, is contrary to decades of precedent from this Court.

Shortly after the *Colgate* decision, the district court for the Northern District of Ohio dismissed an indictment charging resale price maintenance in violation of the Sherman Act on the same ground relied on by the Court of Appeals here: because the manufacturer could have achieved the same result unilaterally, it could not be liable for having achieved the same result by agreement.

> [I]t seems to me that it is a distinction without a difference to say that he may do so by the subterfuges and devices set forth in the opinion [in *Colgate*] and

> not violate the Sherman Anti-Trust Act; yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law.

United States v. A. Schrader's Sons, Inc., 264 F. 175, 184 (N.D. Ohio 1919); *see also United States v. A. Schrader's Sons, Inc.*, 252 U.S. 85, 92-93 (1920) (argument of defendant's counsel). This Court reversed that decision, expressly repudiating the reasoning of the court below, and reiterating that any agreement, "whether express or implied from a course of dealing or other circumstances," distinguishes a case from *Colgate*. *Id.* at 97, 99-100. This Court has continued to emphasize the significant difference between independent and concerted action under section one of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 36-47 (1960).

The Sixth Circuit was therefore incorrect when it formulated the issue in terms of whether Chrysler "needed" acquiescence from its distributors to carry out its policy. 884 F.2d at 907. The real issue is whether there was an agreement, "whether express or implied from a course of dealing or other circumstances." The Record clearly establishes that there was an agreement. Chrylser distributors refrained from bidding on certain government contracts in agreement with Chrysler.

The Amici States agree with petitioner that this Court should grant the petition for certiorari "to disapprove the creation of a new and unwarranted defense under Section 1 of the Sherman Act." Petition at 16.

ILG Was Not Required To Prove That The Government Is A Market

On the premise that the bid allocation agreements at issue here were to be judged under the rule of reason, the Sixth Circuit held that ILG had to prove, among other things, adverse effects "within relevant product and geographical markets. . . ." 884 F.2d at 907. The Court of Appeals went on to hold that

sales to the government do not constitute a market for purposes of proving a violation of the antitrust laws.[7] 884 F.2d at 908-09. Consequently, unless the government is the only purchaser of a particular product or service, collusion or allocation of bids on government purchases between a dual distributing manufacturer and distributors is not an antitrust violation.

The Amici States assert that bid-rigging, including bid allocations by a dual distributing manufacturer and its distributors, is a *per se* violation of section one of the Sherman Act. Consequently, market definition is unnecessary. *See Federal Trade Commission v. Superior Court Trial Lawyers Association*, ___ U.S. ___, ___, 110 S. Ct. 768, 781-82 (1990). However, even assuming that bid allocation of this nature is not *per se* illegal, the court below was still in error in holding that the agreement would not be unreasonable unless its market effects extended beyond government purchases.

This Court made clear in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), that market definition is simply one method of proving competitive injury, and is not necessarily required, even in an ordinary rule of reason case. "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry. . . ." *Id.* at 460-61. Other circuits have followed this Court's lead. *See, e.g., Wilk v. American Medical Association*, ___ F.2d ___, 1990-1 Trade Cases (CCH) ¶ 68,917 at 62,910 (7th Cir. 1990); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1448 (9th Cir. 1988).

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[7] The Court of Appeals discusses market definition in the context of ILC's monopolization claims under section two of the Sherman Act. However, its discussion of market definition relies on the Vertical Restraint Guidelines of the Department of Justice, incorporates the reasons discussed by the trial court, which applied its market discussion to the section one claim, 1988-2 Trade Cases (CCH) ¶ 68,127 at 58,873-75, and refers specifically to section one as well as section two violations. 884 F.2d at 908. We conclude that the issue is therefore fairly raised for appeal.

Surely, if any case presents a clear example of "actual detrimental effects," it is bid allocation. The injury to ILG, of course, is that it was instructed to refrain from entering potentially profitable bidding competitions, and was terminated when it refused. Of particular concern to the Amici States, though, is the injury to competition for the bid, the injury to the government. "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Chrysler pressured ILG and other distributors to keep out of the bidding because it feared their bids would be lower than Chrysler's. The effect of the conspiracy was to increase the price to the government purchaser.

The anticompetitive effects of bid allocation have never been evaluated in terms of the effects on some broader market. *See Union Processing Corp. v. Atkin*, 465 U.S. 1038 (1984)(White, J., Burger, C.J., and Powell, J., dissenting from denial of certiorari). Perhaps government purchasers, except for the Defense Department strategic weapons procurement office, are, in a sense, "but a single purchaser within the overall market." 884 F.2d 909. This description, though, does not eliminate the injury done them by bid allocation, even when the bid allocation is done by a dual distributor. To conclude, as the Sixth Circuit does, that this injury is undeserving of protection under the antitrust laws because the government purchaser does not constitute a "market," totally misunderstands the true goals of the antitrust laws. *See* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982). Indeed, from an economic perspective, each different letting of a contract is a separate auction market. Constantine, *An Antitrust Enforcer Confronts the New Economics*, 58 Antitrust L.J. 661, 663 and n.8 (1989). "Thus, the fact of agreement [by the conspirators] defines the market." *Superior Court Trial Lawyers Association*, 110 S. Ct. at 781 n.18, *quoting* R. Bork, *The Antitrust Paradox* 269 (1978). The Amici States agree with petitioner that ILG should not have "to prove the extent of defendant's market power gauged by a 'relevant market' . . ." Petition at 20.

CONCLUSION

The opinion of the Court of Appeals for the Sixth Circuit departs drastically from existing antitrust law, eliminates the law of vertical restraints in the Sixth Circuit, and leaves government agencies vulnerable to bid allocation and other blatantly anticompetitive acts. The Court should grant ILG's petition for writ of certiorari.

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